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CURRENT TOPICS.

Judge Noah H. Swayne, late of the United States Supreme Court, recently departed this world in his eightieth year. Possessed of no means, he at an early age determined to fight his way to the goal of his ambition with his natural resources and the positions which he has held, the honors which have been heaped upon him, the esteem in which he has been held by the bar of the country speak well for the success which crowned his efforts. His ability was his only staff. He was one of those who are obliged to achieve greatness.

The logic he displayed in his opinions well fited him as a successor of Marshall. His keen perception of the greatest questions, his forcible treatment of everything which came before him, makes such an impression upon those who have had the pleasure of reading his opinions that only a truly obstinate mind could revolt from his conclusions. His judgments will well preserve the tone of the "most august judicial tribunal of the world" long after the man will have fled from the memories of his friends. He needs no monument to remind us of what he has done. When posterity demands who Noah H. Swayne was, let him who takes just pride in the great men of the nation, who appreciates the ability of a judge who for twenty years, served his country's interests faithfully with credit to himself, to the bench which he graced and to his country, never swerving from the path of duty, and who did his share in elevating the mass of constitutional law from the depths of uncertainty, refer the doubter to the Federal Supreme Court Reports from 1862 to 1882, and he will have done enough. "Peace to his ashes."

Our esteemed neighbor, the *American Law Review* in some sensible observations upon the practice of writing short opinions, points out a notable case of the inaccuracy which is likely to accompany the statements of law found therein. Many judges devote their wits as much to seeking out the weaknesses of the profession, its likes and dislikes, and profiting by them in gaining so-called popularity, as to the performance of their duties. The judge who plods along in the performance of his duty, paying no attention to popularity is the judge in whom we have the greatest amount of confidence. If a case deserves thorough consideration, let it receive it whether it requires ten or a hundred pages, whether the bar protests or not. It is the bench that is to be held responsible for its utterances. It is the bench that must be the "butt" for the criticism of the present generation and posterity for its decisions. They will not look to the bar of the time for the origin of a stupid decision, and we say that this continual protest of a portion of the bar, while it may serve as an useful reminder to the judges that they should not spin out their opinions to too great a length is impertinent and ungrateful. To be sure, the law is pretty well settled. These are not such times as those in which even Marshall and Story moved, when the constitutional law of the nation was to be made. The common law is ready made for us. The questions which present themselves to-day generally present narrow, technical phases of questions, which have been settled for years. They generally spring from fertile genius and do not require elaboration, and judges are not elected to display themselves like schoolboys at exhibitions, to show the people how much they know. They are supposed to reach a proper conclusion in as short a time as the importance of the subject may permit, and to clothe their conclusions in as few words as they can with justice to the question employ. The judges of West Virginia, we would presume from the length of their opinions, and the manner in which they discuss the questions before them, have very little faith in the bar of the State; for they lay down fundamental principles with all the solemnity that they can muster, and devote page after page to matters with which every office-boy ought to be familiar. An opinion of thirty pages from this court is something very usual. The protest of the bar against such outrages is proper, and we think our neighbor will agree with us. There are times when prolixity is proper, for instance, when constitutional questions are

under consideration, and then the court should be deaf to the clamor of the bar. We know of no court offending so seriously as the Court of Appeals of West Virginia, and the judges of that court should be censured for their presumptuousness.

To steal an expression of our Albany friend, our Jersey contemporary is "perking up." One thing seems to be evident from the tone of our contemporary's utterances, and that is, that it has a painful affection for monopoly. We profess to have neither love nor hate. We deal with things entirely from a judicial standpoint. We do not seize upon something opposed to railroads with avidity; nor do we suppress anything in their favor. We may be mistaken, but it seems that our Jersey contemporary becomes sad, whenever "popular weal" is mentioned, and those words are so offensive that it long since cast them from its vocabulary, and now professes entire ignorance of their import. We will kindly lend our dictionary to our esteemed contemporary for a short time; perhaps a more liberal use of it would add to its "weal" and to that of its patrons. It further takes us to task for referring to Munn v. Illinois, as supporting the doctrine of the police power of the state to regulate storage rates. Our contemporary has, doubtless, a very keen perception; but we would like to have it inform us to what the court devoted itself almost in the entire consideration of the case, if not, the question of the police power of the state, to regulate such rates. It finally held that such regulation did not deprive the elevator owners of property without due process of law. Why?

ABATEMENT OF NUISANCES.

Abatement of a nuisance is the prostration or removal of the nuisance.[1] Nuisances are usually divided into public or common and private nuisances.[2] It is more proper, however, to divide them into three classes—public, mixed and private nuisances. Adopting this latter sub-division, it will now be proper for us to find the legal definition of each class.

1. "A purely public nuisance is one that affects public rights merely, and does not damage one individual member of the community more than another. Principal among such nuisances are those which merely affect the morals of the community, and arise from the improper, immoral, indecent and unlawful acts of a person."[3] Blackstone says: "Public or common nuisances are those which affect the public, and are an annoyance to all the King's subjects." This definition is somewhat erroneous. A public nuisance is an act which may, not which necessarily does, annoy all the people.[5] "A common nuisance is an offense against the public, either by doing a thing which tends to the annoyance of all the king's subjects, or by neglecting to do a thing which common good requires."[6]

2. As to a mixed nuisance—it is one which is both public and private. It is "a nuisance that while it produces injury and damage to so many persons that it is indictable as a public offense, at the same time inflicts a special and particular damage upon one or several individuals apart from and in excess of the common injury, so that at the same time the persons so injured may sustain actions for the damage sustained by them."[7]

3. A private nuisance is, of course, one which only affects a private individual. "Private nuisance is where any man stoppeth his neighbor's lights, or annoys him in any other manner."[8] "A private nuisance is anything done to the hurt, or annoyance of the lands, tenements, or hereditaments of another."[9]

Now as to the abatement of nuisances, beginning with the last class, namely, private nuisances. These may unquestionably be abated by the act of the person injured or prejudiced.[10] SHAW, C. J., in Brown v. Per-

1 3 Bl. Com. 5.
2 Cooley on Torts, 46; 2 Lily's Register, 360

3 Wood on Nuisances, § 737.
4 3 Com., 216.
5 Wood, § 729, n.
6 Bacon's Abr., Tit. Nuisance, 2 Roll, Abr. 83, Hawk, P. C. C. 75.
7 Wood, § 729; Griffith v. McCullum, 46 Barb. 561; Gregsby v. Clear Lake Co., 40 Cal. 390.
8 2 Lily's Register, published A. D. 1720.
9 3 Bl. Com. 215.
10 3 Bl. Com. 5. 220, Griffith v. McCullum, 46 Barb, 561; 1 Bish. Cr. Law, 829; Lancaster Turnpike Co. v. Rogers, 2 Barr (Pa.) 114; 2 Rolle Abr. 565, Rolle, 394,

kins,[11] says: "The true theory of abatement of nuisance is, that an individual may abate a private nuisance injurious to him, when he could bring an action. Likewise there is no question as to the right of the "person who sustains special injury from a public nuisance to an extent that will support an action at law" to abate such mixed nuisance. He can either abate the nuisance by his own private act or bring his action. The cases upon this point are so numerous that I forbear citing them—I have in my list one hundred and six, which does not indicate an exhaustive examination of the authorities.

It has been frequently said that any person may abate a common or public nuisance.[12] This however is clearly not the law. No person can abate a purely public nuisance.[13] As has been ably shown by Mr. Wood,[14] these cases do not support the statement of the learned author that "any person may abate a public nuisance." Runwick v. Morris,[15] was an action of trespass for cutting away a part of a dam across the Harlem river. The dam had been erected under an act of the legislature. Defendant with others who were interested in the navigation of the river, justified on the ground that the dam was a public nuisance. The court say, that the act of the legislature does not prevent its being abated in the usual way by individuals, at the peril of showing that it was a nuisance, and that they did no unnecessary injury in removing it. Whether or not a stranger might have abated it, was not decided.

In Arundel v. McCulloch,[16] trespass for cutting away a bridge in the town of Arundel, it is said: "and it is clear that when any public way is unlawfully obstructed, any individual who wants to use it in a lawful way, may remove the obstruction."

In Wetmore v. Tracy, defendant justified on the ground that there was a complete obstruction of the highway, which obstructed him, with others in their passing over the road. Nelson, J., says: "Any person may abate a public nuisance," and cites two authors,[17] neither of whom supports the statement. He also cites Hart v. Mayor,[18] where the point was not decided, the court putting the decision expressly upon the ground that the defendant was an aggrieved party.[19]

Mr. Wood,[20] clearly and ably shows that Williams, C. J. in Burnham v. Hotchkiss,[21] cites no cases which sustain him in saying that, "we consider it well settled that a common nuisance may be abated by any person." Indeed, though there have been reckless statements and loose expressions, by writers and courts, yet it is clear that, "No man has a right to abate a purely public nuisance."[22] The abatement must not be exercised to the prejudice of the public peace.[23] This is a clear principle in the law. And it is equally clear that, generally, notice should be given and forcible abatement not made till a reasonable time thereafter.[24] In Earl of Lonsdale v. Nelson,[25] Best, J., said: "Nuisances by act of commission are committed in defiance of those whom such nuisances injure; and the injured party may abate them without notice to the party who committed them; but there is no decided case which sanctions the abatement by an individual of nuisance from omission, except that of cut-

3 Bulstr. 198, 3 Dowl. & R. 556; Gates v. Blincoe, 2 Dana, 158; Cooley on Torts, 46; 1 Hilliard on Torts, 605; Manhattan v. Van Kueven, 23 N. J. Eq-251; Calef v. Thomas, 81 Ill. 478; Earp v. Lee, 71 Ill. 193; Welch v. Stowel, 2 Doug. 332; Barclay v. Com. 25 Pa. St. 503; Rhea v. Forsynth, 37 Id. 506; Hubbard v. Demig, 21 Conn. 356; Amoskeag Co. v. Goodale. 46 N. H. 53; Graves v. Shattuck, 35 Id. 257; Wetmore v. Tracy, 14 Wend. 250; Hart v. Mayor, 9 Id. 571; Arundel v. McCulloch, 10 Mass. 70.

11 12 Gray, 101.

12 1 Bish. Cr. Law, 829; Burnham v. Hotchkiss, 14 Conn. 310; Lancaster v. Rogers, 2 Pa. St. 114; Gates v. Blincoe, 2 Dana 158; Gunter v. Geary, 1 Cal. 462, 3 Bl. Conn. 6; 1 Hilliard on Torts. 605.

13 Bishop in the page above cited relies upon Runwick v. Morris, 7 Hill, 575; Arundel v. McCulloch, 10 Mass. 70; Wetmore v. Tracy, 14 Wend. 250; Hall's case, 1 Mod. 76; and Low v. Knowlton, 26 Me, 128 to support the view of the law expressed by him.

14 In his Law of Nuisances, 755.

15 7 Hill.

16 10 Mass. 70.

17 2 Burn's Justice, 563, and Hawkins, 408, § 61.

18 7 Wend. 589.

19 Jacob Hall's case, 1 Modern, is not in point. In it the question is not even raised.

20 § 736.

21 14 Conn. 310.

22 Wood, § 737. Cooley, Torts, 47 and many cases. (I have 86 cases in my list.)

23 Cooley, Torts, 47; Miller v. Burch 32 Tex. 208; Day v. Day, 4 Md, 262; Graves v. Shattuck, 35 N. H. 257; Perry v. Fitzhowe 8 Q. B. 757; Baldwin v. Smith, 82 Ill. 162; Rung v. Shoneberger, 2 Watts, 97; 1 Hill, Torts, 607; Rex v. Rosewell, 2 Salk. 459; Mohr v. Gault, 10 Wis. 513; Earp v. Lee, 71 Ill. 193.

24 Cooley, Torts, 47; Perry v. Fitzhowe, 8 Q. B. 776; Burling v. Reid, 11 Q. B. 904; Davies v. Williams, 16 Q. B. 546; Jones v. Jones, 1 H. & C. 1; Meeker v. Rensselaer, 15 Wend. 397; State v. Parrott, 71 N. C. 311; s. c. 17 Am. Rep. 5; Harvey v. Dewoody, 18 Ark. 252.

25 2 B. & C. 302, 311.

ting the branches of trees which overhang a public road, or the private property of the person who cuts them. The permitting these branches to extend so far beyond the soil of the owner of the trees, is a most unequivocal act of negligence, which distinguishes this case from most of the other cases which have occurred. The security of lives and property may sometimes require so speedy a remedy as not to allow time to call on the person on whose property the mischief has arisen to remedy it. In such cases an individual would be justified in abating a nuisance from omission without notice. In all other cases of such nuisances, persons should not take the law into their own hands, but follow the advice of Lord Hale, and appeal to a court of justice."

It seems then, that notice is unnecessary (1) where there is a positive wrongful act, (2) where the defendant has been grossly negligent, and (3) where there is imminent danger to life or health or a necessity for immediate action. In all other cases there must be notice.[26] In abating the nuisance, of course as little injury as possible must be inflicted.[27] But in Indianapolis v. Miller,[28] it was held that the party abating the nuisance is only liable for wanton or unnecessary injury.[29] And "the kind of property constituting the nuisance, and the attending circumstances, must be considered in determining the question." In Roberts v. Rose,[30] Blackburn, J., said: "Where a person attempts to justify an interference with the property of another, in order to abate a nuisance, he may justify himself as against the wrong-doer, so far as his interference was positively necessary. We are also agreed that in abating a nuisance, if there are two ways of doing it, he must choose the least mischievous of the two. We also think if, by one of these alternative methods, some wrong would be done to an innocent third party, or to the public, then that method can not be justified at all, although an interference with the wrong-doer himself might be justified. Therefore, when the alternative method involves such an interference, it must not be adopted, and it may become necessary to abate the nuisance in a manner more onerous to the wrong-doer."

Lord Campbell, Ch. J., in Dunes v. Petley,[31] said: "It is fully settled by the recent cases that if there be a nuisance in a public highway, a private individual can not, of his own authority, abate it, unless it does him a special injury, and then only to the extent necessary to enable him to exercise his right of passing over the highway. And we clearly think he can not justify doing any damage to the property of individuals who have improperly placed the nuisance there, if, avoiding it, he could have passed on with reasonable convenience." In Cooper v. Marshall,[32] it was expressly held that no one had a right to abate more of a nuisance than was necessary to secure his rights, because when that was done as to him the thing ceased to be a nuisance. In Rex v. Pappineau,[33] Lord Raymond said, "that if any neighbor builds his house too high, by which my ancient lights are stopped, I shall not take down the whole house, but only so much as makes it too high." For any excess of abatement the party is liable to respond in damages.[34] A house must not be razed merely because the use to which it is put is a nuisance.[35]

[26] Penruddock's Case, 5 Rep. 101; Jones v. Williams, 11 M. & W. 176; Van Wormer v. Albany, 15 Wend. 262; Meeker v. Van Rensselaer, 15 Wend. 397; Burling v. Reid, 11 Q. B. 904; Davies v. Williams, 16 Q. B. 546; Harvey v. Dewoody, 18 Ark. 252. And see Hart v. Albany, 3 Paige, 213; Occum Co. v. Sprague Co. 34 Conn. 529.

[27] Dimes v. Petley, 15 Q. B. 276; Roberts v. Rose, L. R. 1 Ex. 82; 4 H. & C. 102; 12 Jur. N. S. 78; 35 L. J. Ex. 62; 13 L. T. N. S. 471; 12 W. R. 141; Cobb v. Bennett, 75 Pa. St. 326; Broom's Com. 222; Cooper v. Marshall, 1 Burr. 260; Rex v. Pappineau, 1 Strange, 688; State v. Keenan, 2 Ames (R. I.) 497; Gates v. Blincoe, 2 Dana 158; Arundel v. McCulloch, 10 Mass. 70; Welch v. Stowell, 2 Doug. (Mich.) 332; State v. Moffett, 1 Iowa 247; Goldsmith v. Jones, 43 How. (N. Y.) 415; Cobb. v. Bennett, 75 Pa. St. 326; Blanc v. Klunpe, 29 Cal. 156; Heath v. Williams; 25 Me. 209; Adams v. Barney, 25 Vt. 225; Finley v. Hershey, 41 Iowa 199.

[28] 27 Ind. 394.

[29] Northrup v. Burrows, 10 Abb. Pr. 365.

[30] L. R. 1 Ex. 80.

[31] 15 Q. B. 276.

[32] 1 Bur. 260.

[33] 1 Str. 688.

[34] State v. Keenan, 2 Ames (R. I.) 497; Greenslade v. Halliday, 6 Bing. 379; Roberts v. Rose, L. R. 1 Ex. 82; State v. Moffett, 1 Greene (Iowa) 247; Moffett v. Brewer, Id. 348; Indianapolis v. Miller, 27 Ind. 394; Northrop v. Burrows, 10 Abb. Pr. 365; Dyer v. Depui, 5 Whart. 584.

[35] Welch v. Stowell, 2 Doug. 332; Barclay v. Com., 25 Pa. St. 503; State v. Paul, 5 R. I. 185; State v. Keenan, 5 R. I. 497; Ely v. Supervisors, 36 N. Y. 297; Miller v. Burch. 32 Tex. 208; Brown v. Perkins, 12 Gray 89; Earp v. Lee, 71 Ill. 193. s. c. 5 Am. R. 242; Blodgett v. Syracuse, 36 Barb. 529. Moody v. Super-

In Barclay v. Com.,[36] Justice Woodward said, "Where an erection or structure itself constitutes a nuisance, as where it is put in a public street, its demolition or removal is necessary to abate the nuisance; but where the offense consists in a wrongful use of a building, harmless in itself, the remedy is to stop such use, not to tear down or remove the building itself." Brightman v. Bristol,[37] was a fully and carefully considered case where a building, in which a business offensive from its smells was carried on, was torn down. This was held unjustifiable and there was a recovery of the full value of the building.

A disorderly house is a nuisance, but it is not in the building; it is in the character of its occupation.[38] And the arrest of its evil influences must be by an appeal to the law.[39] It is only where an erection or structure in itself constitutes a nuisance because of its being erected in a public street, or without right either on public or private grounds, that its demolition and removal can be justified.[40]

An abatement "is a preventive remedy merely, and resembles more an entry into land, or recapture of personal property. Neither will bar an action for the original invasion of the plaintiff's right."[41]

In Pettis v. Johnson,[42] it is said that a right by prescription to continue a public nuisance cannot be acquired. This is the law.[43] But it has been held that a use for twenty years is sufficient to legalize a noisy nuisance.[44]

Of course, the right to an action for a nuisance will be barred by lapse of time. For example in Lucas v. Marine,[45] it was held that in an action for injury to real estate by a nuisance, an answer alleging that a cause of action did not accrue within six years was good.[46]

But an action on the case for a nuisance is not abated or barred by a subsequent abatement of the nuisance by the plaintiff.[47] And successive actions will lie for a continuing nuisance.[48]

The amount of the damage is wholly unimportant—an action will lie for a public nuisance on proof of special damage, however trifling.[49]

The liability for personal injury occasioned by the continuance of a nuisance is joint as well as several; there may be a recovery against both lessor and lessee.[50] The remedy against a public nuisance is in all respects concurrent with that by indictment.[51] The foregoing principles constitute the founda-

visors, 46 Barb. 659; Grey v. Ayers, 7 Dana 375; Van Wormer v. Albany, 15 Wend. 262; Meeker v. Van Rensselaer, Id. 397; Brightman v. Bristol, 66 Me. 426, s. c. 20 Am. R. 711; Finley v. Hershey, 41 Iowa 389; Shiras v. Olinger, 50 Iowa 571.

36 25 Pa. St. 508.

37 65 Me. 426.

38 King v. Rosewell, 2 Salk. 459; Welch v. Stowell, 2 Doug. 332; Ely v. Supervisors, 36 N. Y. 297; Gray v. Ayres, 7 Dana, 375.

39 Blodgett v. Syracuse, 36 Barb. 527; Welch v. Stowell, 2 Doug. 332, and cases cited *supra*; Gray v. Ayres, 7 Dana, 375.

40 Cooley, Torts, 49; Barclay v. Com., 25 Pa St. 503; Rung v. Shoneberger, 2 Watts. 23; Com. v. McDonald, 16 S. & R. 394; Pearsall v. Post, 20 Wend. 117.

41 Pierce v. Dart, 7 Cow. 609, 612. And see, Wetmore v. Tracy, 14 Wend. 250; State v. Moffett, 1 G. Gr. 47; Lansing v. Smith, 4 Wend. 9; Hudson R. Co. v. Loeb, 7 Rob. 418.

42 56 Ind. 139.

43 Wood on Nuisances, sec. 724, citing Mills v. Hall, 9 Wend. 315; Taylor v. People, 6 Parker's Cr. R. 363; Com. v. Upton, 6 Gray, 475; Howell v. McCoy, 3 Rawle, 256; Weld v. Hornby, 7 East, 199; Com. v. Mettenberger, 7 Watts, 69; Fowler v. Saunders, Cro. Jac. 446; People v. Cunningham, 1 Denio, 524; Elkins v. State, 3 Humph. 543; Com. v. Van Sickle, Brightley, (Pa.) 69; R. Co. v. State, 20 Md. 157; Gurling v. Barfield, 16 C. B. (N. S.) 597; Morton v. Moore, 15 Gray, 573; Trotter v. Mayor, 4 Green, (N. J.) 46; Cross v. Morristown, 18 N. J. 305. See State v. Phipps, 4 Ind. 515; City of Rochester v. Erickson, 46 Barb; State v. Franklin Falls Co., 49 N. H. 240; Dygert v. Schenck, 23 Wend. 445; Patten v. N. Y. Elevated R. Co., 3 Abb. N. Cas. 324, DeLaney v. Blizzard, 7 Hum. 7; Rung v. Shoneberger, 2 Watts, 23; Com. v. Alburger, 1 Whart. 487; Com. v. Philadelphia, 16 Pa. St. 94; Renwick v. Morris, 7 Hill, 576; Partridge v. Gilbert, 3 Duer. 203; Marvin v. Brewster Co., 55 N. Y. 559; Campbell v. Seaman, 2 N. Y. Sup. Ct. 241; Crill v. City, 47 How. Pr. 406; Ogdensburgh v. Lovejoy, 2 N. Y. Sup. Ct. (T. & C.) 83; s. c. affirmed, 58 N. Y. 662; Rhodes v. Whitehead, 27 Tex. 304; Reg. v. Brewster, 8 Up-Can. R. (C. B.) 203; Philadelphia Co. v. State, 20 Md. 157; Rochester v. Erickson, 46 Barb. 92; State v. Rankin, 3 S. C. 438; Morton v. Moore, 15 Gray, 573; Cross v. Major, 18 N. J. Eq. 305.

44 Elliotson v. Feetham, 2 Bing. N. C. 134; s. c. 2 Scott, 174. See as to the right of prescription to exercise a trade which sends smoke and offensive stenches over the neighborhood. Roberts v. Clarke, 18 L. T. N. S. 48; Bliss v. Hall, 4 Bing. (N. C.) 188; 6 Scott, 500; Charity v. Riddle, 14 E. C. (S. C.) 340.

45 40 Ind. 289.

46 So in O. & M. R. Co. v. Simon, Id. 278.

47 Call v. Buttrick, 4 Cush. 345.

48 Phillips v. Terry, 3 Keyes, 313; s. c. 3 Abb. Dec. 607.

49 Pierce v. Dart, 7 Cow. 609; Lansing v. Smith, 4 Wend. 9; Hudson R. Co. v. Loeb, 7 Rob. 418; Alexander v. Kerr, 2 Rawle, 83; Casebeer v. Mowry, 55 Pa. St. 412.

50 Irvine v. Wood, 51 N. Y. 224; s. c. 4 Rob, 138; 5 Id. 482.

51 Knox v. Chaloner, 42 Me. 150; Brown v. Black, 43 Id. 443.

tion of much of the law of procedure in the matter of nuisances. The question as to what constitutes a nuisance is equally important, but not equally plain, but cannot be laid down in this article.

G. R. ELDRIDGE.

Delphi, Ind.

DEEDS OF A TESTAMENTARY CHARACTER.

The Supreme Court of Iowa has recently decided a case[1] of more than ordinary interest. The plaintiff brought an action to remove a cloud from, and to quiet his title to certain land he claimed to own, averring that the defendant made some claim to it. He admitted in his petition that he and his wife had executed to the defendant an instrument somewhat in the form of a deed, but averred that it was to take effect only after the death of himself and wife, and for that reason it was testamentary in its character, and he, at the time of bringing the suit, desired to revoke and cancel it. The defendant, by answer, denied that the instrument was testamentary in its character, and averred that it had been executed for a valuable consideration paid by him to the plaintiff, and was intended to convey to the defendant an estate in the premises which should be absolute upon the death of the plaintiff and his wife. The plaintiff had set out a copy of the deed as an exhibit, which was admitted by the defendant to be correct. This deed contained words, purporting to convey the premises, in the usual form of a deed, and contained the following language: "To commence after the death of both the said grantors," and also that "It is hereby understood and agreed between the grantors and the grantee that the grantee shall have no interest in said premises as long as the said grantors, or either of them, shall live; and that after the death of both of said grantors, the grantee shall have and hold the premises by fee simple title." A demurrer was sustained to the defendant's answer, and on appeal this decision was affirmed.

The appellate court held the instrument a testamentary deed, and consequently void, notwithstanding a statute provided that "estates may be created to commence at a future day." The case before them was held distinguishable from a case of a future estate. In the latter instance it was said "that any language employed by the grantor which would be sufficient to create an estate to commence at a future day, would, in the nature of the case, give a present interest in the property. The estate would stand created, and the enjoyment postponed."

The instrument having expressly declared that the grantee should have no interest in the premises as long as the grantors, or either of them, should live, the court said with respect to this clause:

"A declaration that the grantee takes no interest during the life of the grantor is equivalent, we think, to a declaration that no estate is created. The instrument, it is true, evinces an intention favorable to the grantee, but that intention is, in substance, only testamentary, and is, of course, subject to revocation, if indeed, a revocation is needed to prevent it from becoming operative. The object of the defendant's averment, that a valuable consideration passed, was to give the instrument a present operation as binding the property. It was of no consequence in any other respect. If the court below held that it was proper to plead and prove such fact, it would have held virtually that an express provision of the instrument could be overruled. We can conceive that a valuable consideration might pass as an inducement to the person receiving it to make a devise. If a devise in form should be made under such inducement the instrument by which it should be made would still be testamentary, and being such, would be revoked."

The principle lying at the basis of this decision is traceable to the old common law rule, that no estate can be created to commence in the future. By that law no freehold in lands could pass without livery of seisin, "which must operate either immediately, or not at all." It was therefore deemed a contradiction to say that an estate may be created by an instrument which imports an immediate possession, but of which in fact possession was not given until afterwards.[2]

[1] Leaver v. Gauss, 17 N. W. Rep. 522; s. c. 16 Chic. L. N. 138.

[2] 2 Black. Com. 165; see 2 Wood Con. 117; Singleton v. Bremar, 4 McCord (S. C.) 12; s. c. 17 Am. Dec 698.

This old rule has not been abrogated in this country by the substitution of the delivery of the deed, instead of the common law mode of passing it by livery of seisin.[3] The fee can never be in abeyance. The power of disposing of the fee is inseparable from the person in whom it is vested, and so long as it abides there the power remains. Consequently, if that fee remains in the grantor until his death, he may convey it at any time before his decease.

In the Iowa case the grantor's expressed intention was that no estate or interest in the real estate described should pass until his death took place. This was the turning-point of the case. Had no contest over the instrument been raised until after the person executing it had died, a very different question would have been presented. But he himself raised the question. It was held that no estate could vest in express opposition to the grantor's intention; and such is the rule declared in other cases.[4] Thus where a brother going to war executed an instrument, in the form of a deed, giving to his four sisters all his moneys and lands in the event he died or was "killed in the casualties of the war, but if he should survive and return, then the instrument "to be null and void, otherwise to remain in full force and effect," it was held that it was an instrument of a testamentary character, and could have no effect as a deed.[5] In another instance the deed read, "I do hereby, in case of my death, give to Tabitha Singleton my house and lot on Wentworth Street, and to the said Tabitha, her heirs and assigns forever, having received full value," followed by covenants of warranty, it was held that the grantee "took nothing under the paper, whether it be regarded as a will or deed."[6] In an old case the instrument drawn in question was entitled "Articles of Agreement," made between A of the one part, and B of the other; it was agreed between them that A being sick in body, gives, etc.; in consideration whereof B promised to pay several sums of money. The instrument concluded in the ordinary manner of deeds, *i. e.* "in witness whereof the parties have hereunto interchangeably set their hands and seals." Although it was delivered as a deed, the court held that it was void as such.[7] An instrument beginning as follows, "Know all men by these presents, that we A. B of the one part, and C. D of the other part, have covenanted and agreed, and do covenant and agree, for the love and affection we bear each other, that which ever of us may be longest lived shall be the heir of the other," etc., was held to be a will.[8]

And it may be laid down as a general rule that an instrument in the form of a deed, signed, sealed and delivered as such, if it discloses the intention of the maker respecting the posthumous destination of his property, and is not to operate until after his death, it is a will and not a deed.[9] Such is clearly the case where the instrument has not been delivered during the life of the person executing it, and it directs that the disposition of the property be made after his death.[10] But where an instrument made a settlement of certain bank annuities, reserving a life interest to the settler, with power of revocation, it was held to be a deed and not a will.[11] On

[3] Singleton v. Bremar, *supra*.

[4] Singleton v. Bremar, *supra*; Gillham Sisters v. Mustin, 42 Ala. 365; Fletcher v. Fletcher, 4 Hare 79; Adams v. Broughton, 13 Ala. 731; Wall v. Wall, 30 Miss. 91; Robertson v. Dunn, 2 Murph. (N. C.) 133; s. c. 5 Am. Dec. 522; Butler v. Scofield, 4 J. J. Mar. 139; Hester v. Young, 2 Kelley (Geo.) 31; Brewer v. Baxter, 41 Geo. 212; s. c. 5 Am. Rep. 530; Miller v. Holt, 68 Mo. 584; Armstrong v. Armstrong, 4 Baxt. 357. It does not change the character of the instrument because it was executed in pursuance of a previous promise or obligation appearing on its face. Such an instrument, if to have operation only after the death of him who executed it, is still a will. *Re* Diez, 50 N. Y. 88. In matter of Belcher, 66 N. C. 51. See Jordan v. Jordan, 65 Ala. 301.

[5] Gillham Sisters v. Mustin, 42 Ala. 365.

[6] Singleton v. Bremar, *supra*.

[7] Green v. Proude, 3 Keb. 310; s. c. 1 Mod. 117; see Peacock v. Monk, 1 Ves. 127; s. c. Belt's Suppl. 82.

[8] Evans v. Smith, 28 Geo. 98; see Taylor v. Kelley, 31 Ala. 59. An instrument executed in the form of a Scotch settlement at a time when lands in Scotland were not disposable by will, but containing dispositions intended for the most part to take effect after the decease of the maker, was held to be testamentary. Hogg v. Lashley, 7th of May, 1792, stated in 3 Hagg 415 note; see Tomkyns v. Ladbroke, 2 Ves. 591.

[9] Johnson v. Gancey, 20 Geo. 707; Boyd v. Boyd, 6 Gill & J. 25; Wareham v. Sellers, 9 Gill & J. 98; Lyles v. Lyles, 2 Nott & McC, 531; Dawson v. Dawson, 2 Strobh. Eq. 34; Majoribanks v. Hovenden, 1 Dru. 11; In Goods of Morgan, L. R. 1 P. & D. 214; Masterman v. Moberly, 2 Hagg. 247; Stewart v. Stewart, 5 Conn. 317; Pitkin v. Pitkin, 7 Conn. 315.

[10] Ragsdale v. Booher, 2 Strobh. Eq. 348; Attorney-General v. Jones, 3 Price, 368; Alexander v. Brame, 7 De G. M. & G. 530; s. c. 8 H. L. Cas. 594.

[11] Thompson v. Browne, 3 My. & K. 32; Questioning Attorney General v. Jones, *supra*. This latter case is declared not to be good law by Lord St. Leonards in Brown v. Attorney-General, 1 Macq. S. C. Ap. 35.

the contrary an instrument in the form of a deed *inter partes* and purporting to convey property to trustees, but providing that the trusts should not take effect until after the death of the donor, was held to be a will.[12]

In Thompson v. Browne, the instrument had a present effect in fixing the terms of the future enjoyment of the settlement, and did not, in fact, require the death of the alleged testator for its consummation. In all such cases the instrument is a deed. Such was deemed the case where the instrument was a lease which contained a provision for the distribution of the rent after the lessor's death, among his grand children, of whom the lessee was one. This was deemed to be irrevocable.[13]

In the principal case, the person who executed the instrument sought to have it cancelled. This was only another method of revoking it. And it is the established law with reference to deeds of a testamentary character, that they can be revoked by the party executing them at any time during his life. They stand on no higher plain than the ordinary will while the testator is living; have precisely the same effect, no less nor any greater. No one has a vested interest in them and they are of no force.[14]

To construe such an instrument a will, "it is essentially requisite that the instrument should be made to depend upon the event of the death to consumate it; for where a paper directs a benefit to be conferred *inter vivos*, without reference expressly or impliedly, to the death of the party conferring it, it cannot be established as testamentary."[15] Thus an instrument purporting to convey, not any portion of what the maker then owns, but a portion of that of which he shall die seized, is not a deed, but a will.[16]

The intent with which the instrument was executed will largely determine its character.[17] In case its maker retains possession of it, and it is never delivered to the beneficiary or to any one for his benefit, and the instrument is of doubtful import upon its face, it will be construed to be a will, if it has been executed in accordance with the Statute of Wills.[18] In one case it was held that it being impossible for the instrument to have any effect as a deed, the court would hold it to be a will, under the general rule that some effect, if possible, must be given to a written instrument rather than to declare it void.[19]

The statement just made must, however, be received with caution, for it is a rule in the construction of an instrument claimed to be a will that it will not be held to be such unless it appears to have been executed with an intention of disposing of the property referred to in it.[20]

So an instrument which conveyed all the property owned by the grantor to a trustee for the benefit of her grand-children, after her death—but retained for her the possession and use of it during her life, and reserved to her the power of revocation of the grant, it was held to be a deed, and not a will. Hall v. Hall, 50 Ala. 349.

[12] *In re* Morgan L. R. 1 P. & D. 214, such was the case of Dold, Cross v. Cross, 8 Q. B. 714.

[13] *In re* Robinson, L. R. 1 P. & D. 384; see Patch v. Shore, 2 Dr. & Sm. 589.

[14] See Gillham Sisters v. Mustin, 42 Ala. 365; Watkins v. Dean, 10 Yerger, 320; s. c. 31 Am. Dec. 583; Ward v. Ward, 2 Swan. 654; Swails v. Bushart, 4 Head 564; Gilmore v. Whitesides, Dud. Eq. (S. C.) 14; s. c. Frederick's Appeal, 52 Pa. St. 338.

[15] Gillham Sisters v. Mustin, *supra*; Adams v. Broughton, 13 Ala. 731; Dunn v. Bank of Mobile, 2 Ala. 152; Shepherd v. Nabors, 6 Ala. 631; Thompson v. Johnson, 19 Ala. 59; Kinnebrewer v. Kinnebrewer, 35 Ala. 628. "In determining whether an instrument be a deed or will, the main question is, did the maker intend to convey any estate or interest whatever to vest before his death, and upon the execution of the paper? Or, on the other hand, did he intend that all the interest and estate should take effect only after his death? If the former, it is a deed, if the latter, a will; and it is immaterial whether he calls it a will or deed, the instrument will have operation according to its legal effect." Wall v. Wall, 30 Miss. 91; Williams v. Tolbert, 66 Geo. 127; Sperber v. Balster 66 Geo. 317; Jordan v. Jordan, 65 Ala. 301; Meck's Appeal, 97 Pa. St. 313.

[16] Walls v. Ward, 2 Swan, 654; Swails v. Bushart, 4 Head, 564; Watkins v. Dean, 10 Yerg. 320; s. c. 31 Am. Dec. 583; Turner v. Fisher, 4 Sneed, 211. In the two cases first cited it is said that if the instrument purports a conveyance of an estate in property which the maker then owns, to take effect at the latter's death, it is a deed. This language may well be doubted unless it is meant that the grantor covenants to stand seized during his life time, but the grantee is not to enter upon the enjoyment of the estate until at the former's death.

[17] Daniel v. Hill, 52 Ala. 430.

[18] Nichols v. Chandler, 55 Geo. 369.

[19] McBride v. McBride, 26 Gratt. 476. it was held that such a construction would be given it, even against the character in which it was intended to operate, if it was designed to operate as a disposition of property. Georgia has a statute declaring any instrument testamentary which is not intended to take effect until after the death of the maker. Under this statute a paper having all the formalities of a deed, but concluding: "This deed is not to go into effect until after the death of the said B, (the grantor) he being ill, was held to be a deed." Bright v. Adams, 51 Geo. 239. See Edwards v. Smith. 25 Miss. 197.

[20] It must operate as a will. Robey v. Hannon, 6 Gill, 467; Hamilton v. Peace, 2 Des. 79; Hall v. Bragg, 28 Geo. 330; Moye v. Kittrell, 29 Geo. 677; Swett v.

However, the fact that it was intended to operate as a deed will not effect its operation as a will after the maker's death.[21]

The question often arises whether total evidence is admissible to show the intent with which an instrument is executed, in order to determine whether it is a will or deed. In an English case in holding an instrument as a deed, the fact that it had been registered was deemed almost conclusive.[22] In case the instrument is not testamentary either in form or in substance, collateral evidence is admissible to show that it was intended as a will.[23]

If the instrument is in the form of a deed, in the absence of other evidence, it will be construed to be a deed. "The form is evidence of the intention of the maker." "If the words were doubtful we should incline to that construction which would support the instrument."[24]

If the instrument is a deed, it is not entitled to probate; if a will, it is so entitled. It is obvious that the question at once arises whether the instrument offered is entitled to probate, and many cases have arisen at this point.[25] A refusal to allow the probate of the proferred instrument usually can not injure the person claiming under it if it is a deed; for if the refusal is upon the ground that it is a deed, the grantee has all he can claim under it. If not a deed, it will be of no avail to the claimant under it until probated.

Although some of the provisions of the instrument were intended to operate as a contract or deed *inter vivos*, it is not the less a will in regard to other provisions in it.[26] It may be a deed in part and a will in part.[27]

The fact that the instrument is executed with all the formalities of a deed will not make it so, or prevent it being construed a will if it is in fact testamentary. These are only facts tending to show the intention of the maker, but not conclusive.[28] If it is testamentary in character, although duly acknowledged or executed in conformity to the law appertaining to deeds, yet if not executed in conformity to the law governing the execution of wills, it is void, and no court is authorized to give it validity.[29]

We have not overlooked the case of a covenant to stand seized of land for another's use. In such an instance the *cestui que use* has a present interest. It is unnecessary here to enter into the question, any farther than to cite several cases, although it has a very close connection with the subject under consideration; and care must be used to avoid any

Boardman, 1 Mass. 258; Combs v. Jolly, 2 Gr. Ch. (N. J.) 625; Bristol v. Warner, 19 Conn. 7; Plater v. Groome, 3 Md. 134.

21 *In re* Morgan L. R. 1 P. & D. 214; Masterman v. Moberly, 2 Hagg. 247; Pitkin v. Pitkin, 7 Conn. 315. See Stewart v. Stewart, 5 Conn. 317. It does not always follow that because an instrument cannot operate in the form in which it was made, it must operate as a will. Edwards v, Smith, 35 Miss. 197.

22 Majoribanks v. Hovenden, 1 Dru. 11.

23 Robertson v. Dunn, 2 Murph. (N. C.) 133; s. c. 5 Am. Dec. 525; Robey v. Hannon, 6 Gill, 467; Moye v. Kittrell, 29 Geo. 677; Hall v. Bragg, 28 Geo. 330; Hamilton v. Pearce, 2 Des. 79. Declarations of the testator is admissible in such a case. Witherspoon v. Witherspoon, 2 McCord, 520; Robertson v. Smith, 2 L. R. Prob. 43; s. c. 22 L. T. (N. S.) 417; *Contra* Warehorn v. Sellers, 9 Gill & J. 98; see Walker v. Jones, 23 Ala. 448.

24 Moye v. Kittrell, 29 Geo. 667; Miller v. Holt, 68 Mo. 586. The facts of its excution and delivery, and the declarations of the maker at the time, together with the instrument, should be permitted to go to the jury. Herrington v. Bradford, 1 Miss. (Walk.) 520.

25 See also, upon this question, Manly v. Lakin. 1 Hagg. 130; In re Dunn, 1 Hagg. 488; Henderson v. Farbridge, 1 Russ. 479; Millicon v. Millicon, 24 Tex. 426; Walker v. Jones, 23 Ala. 448; Mosser v. Mosser, 32 Ala. 551; Hester v. Young, 2 Geo. 31; Symmes v. Arnold, 10 Geo. 506; Johnson v. Yancy. 20 Geo. 707; Carey v. Dennis, 13 Md. 1; Allison v. Allison, 4 Hawks (N. C.) 141; Bobb v. Harrison, 9 Rich. Eq. (S. C.) 111; Welch v. Kinard, Spears (S. C.) Ch. 256. An instrument revoking former wills, and leaving the maker's property for "distribution under the laws of the State," is testamentary in character. Lucas v. Parsons, 24 Geo. 640. See Bagley v. Bailey, 5 Cush. 245; Means v. Means, 5 Strobh. (S. C.) 167. The turning point is, does the property intended to be given or conveyed, vest at any time before the death of the maker; if so, it is a deed, and not a will; otherwise a will. Jackson v. Culpeper, 3 Geo. 569; Lightfoot v. Colgin, 5 Munf. (Va.) 42; Boling v. Boling, 22 Ala. 826; Jones v. Morgan, 13 Geo. 515; Plater v. Groome, 3 Md. 134; Clagett v. Hawkins, 11 Md. 381; Michael v. Baker, 12 Md. 158, (an ante-nuptial agreement declared not to be a will); Dawson v. Dawson, Rice (S. C.) Ch. 243; Hoeker v. Hoeker, 4 Gratt. (Va.) 277. An instrument intended to operate as a deed, can not take effect as a will, though worthless as a deed. Edwards v. Smith, 35 Miss. 197; Stevenson v. Huddleson, 13 B. Mon. 299; Porter v. Turner, 3 S. & R., 108; Rose v. Quick, 30 Pa. St. 225, (a power of attorney held to be a will.) A deed, not executing a power, nor containing a power of revocation, but confirming a will previously made, can not be regarded as a testamentary instrument; Mayor, etc. of Baltimore v. Williams, 6 Md. 235; See Gage v. Gage, 12 N. H. 371; Turner v. Scott, 51 Pa. St. 126; Golding v. Golding, 24 Ala. 122.

26 Taylor v. Kelly, 31 Ala. 59.

27 Robinson v. Schly, 6 Geo. 515.

28 Jackson v. Culpepper, 3 Geo. 569; Moye v. Kittrell, 29 Geo. 677; Lyles v. Lyles, 2 Nott. & McC. (S. C.) 531.

29 Murry v. Murry, 6 Watts (Pa.) 353; Dawson v. Dawson, Rice (S. C.) Ch. 243. See Bass v. Bass, 52 Geo. 531.

confusion arising in considering deeds of a testamentary character and covenants to stand seized to a use.[30]

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[30] Wallis v. Wallis, 4 Mass. 135; s. c. 3 Am Dec. 210; Parker v. Nichols, 7 Pick. 111; Gale v. Coburn, 18 Pick. 397; Brewer v. Hardy, 22 Pick, 376; Clark v. Deshon, 12 Cush. 589; Barrett v. French, 1 Conn. 364; Wardwell v. Bassett, 8 R. I. 305; Jackson v. Statts, 11 Johns, 337; s. c. 6 Am. Dec. 376; Wyman v. Brown, 50 Me. 154; Watkins v. Otis, 2 Pick. 88; Roe v. Freeman, 2 Wils. 75; Doe v. Simpson, 2 Wils. 22; Jackson v. Dunsbagh, 1 Johns. Cas. 91; Casey v. Buttalph, 12 Barb. 637; Gott v. Gott, 7 Paige, 534; Goodell v. Pierce, 2 Hill, 659. See Meck's Appeal, 97 Pa. St. 313; Hart v. Rust, 46 Tex. 556; Steel v. Steel, 4 Allen, 417.

COMMON CARRIER—PASSENGERS—DUTY TO PASSENGERS—CONTRIBUTORY NEGLIGENCE, REMOTE AND PROXIMATE CAUSE—PRESUMPTION OF NEGLIGENCE FROM INJURY.

TERRE HAUTE & INDIANAPOLIS R. R. CO. v. BUCK.

Supreme Court of Indiana, March 5, 1884.

1. Where a wrongful act is the cause of the immediate cause of death, he who is responsible for the first cause is liable for all the consequences of the second. Thus, where the deceased was injured by the defendant's neglect and malarial fever was brought on which was the cause of his death the defendant is responsible for the death.

2. The fact that injury is suffered by one while upon a train as a passenger is *prima facie* evidence of the carrier's liability.

3. A passenger has the right when things indicate that the train is at his stopping place, to presume that the train has stopped at a place where he may safely alight, and no court can as a matter of law declare him guilty of contributory negligence in alighting from the train in a dark night after the customary signal has been given for stopping at his known destination and the train has fully stopped near the usual alighting place.

Appeal from the Montgomery Circuit Court.

ELLIOTT J., delivered the opinion of the court.

On the night of Dec. 9th, 1881, the appellee's intestate Andrew J. Buck, took passage on one of the appellants passenger trains at the town of Darlington for the station of Sugar Creek not far distant. Both these places were regular stations of the company at which passengers were received and discharged, and the train on which the deceased took passage stopped at Sugar Creek. About the time the train usually arrived at this station and at the place where the signal whistle for the station was usually sounded, the engineer caused the customary signal to be given and applied the brakes, but the brakes did not stop the train and it ran by the station and was stopped on a trestle bridge three hundred and eighty five feet beyond the usual stopping place. The deceased stepped from the car in which he was sitting and fell through the bridge a distance of nineteen feet and struck upon the rocks which formed the bed of the stream spanned by the trestle work. The night was dark and there were no lights about the place where train was stopped, and the length of the stop was about that ordinarily made at small passenger stations. The regular station was a safe place to alight, and the deceased lived not far distant and was acquainted with the station and its surroundings. The station had not been called at the time the deceased left the train, but there was evidence showing that it was not the custom of the railroad company's employees to call the name of the station. The deceased was found in the creek, and if not delirious when first reached, very soon became so, and was taken to a house near by. It was not far from eight o'clock when he fell from the trestle work and the physician who reached him at half past ten o'clock thus described his condition. I found him lying upon the bed on his left side, his head somewhat elevated, his body in a perspiration, right leg drawn up, left extended; there was a cut on his chin on the left side, it was about an inch and a half long; his left ankle was swollen, blood clot on either side, and there was a bruise on his back, low down. His eyes were closed, one of the pupils of his eyes was larger than the other, one dilated and the other contracted. He seemed to be suffering pain, groaning and crying and asking "Where am I? What has happened? where is Bess? That is the name by which he called his wife; his sense of hearing seemed to be not acting, as he would not respond to questions except by a groan." The witness then stated that he took the temperature of his patient's body and stated the result of his examination in detail; visits were made on the 10th, 11th and 14th days of Dec., and the deceased was still suffering from the pain in his head. In answer to a question the physician said: "He was suffering from what we call a concussion of the brain, it continued until Jan. 14th, 1882, the day of his death." A visit was made on the 16th of Dec., and from that time visits were made daily and oftener until the death of the patient. A graphic description of the progress of the case was read from a book called the "The physicians Case Book," and from this testimony it appeared that the pain in the head and the surgical fever found present on the 10th day of Dec. continued until the end, but that typho-malarial fever had supervened and that the immediate cause of death was hemorrhage from the bowels. The medical witness was asked on cross-examination how the injury contributed to the death of his patient and he answered: "By receiving a fall on the 9th of Dec. and in that fall receiving a concussion of the brain. There was a condition of the brain in which his nervous system was affected

and by the sprained ankle which confined him to his bed; and the injury under his jaw and on his back by confining him to his bed put his system in a favorable condition to take whatever disease might be prevailing in the community, and the result of his being confined to his bed and the surgical fever he had following these injuries. He gradually drifted into malarial troubles which were then rife in our community. The shock that his nervous system had received and the depressing influence it had upon his system had rendered it less liable to bear the continued fever and typho-malarial fever, and this surgical fever put him in a condition to take on malarial fever, and the result of his malarial fever was hemorrhage of the bowels from which he died." At another place in his testimony the witness said, that the injuries did, in one sense, produce the fever which resulted in death. Dr. Hopper another physician testified that he visited the deceased on the 11th day of Jan. and in answer to an interrogatory, gave it as his opinion: "That the fall contributed to his death, the injuries received from falling off the trestle." It was proved that the malarial fever was epidemic in the vicinity of Sugar Creek station, and that the deceased prior to the fall from the trestle work was in robust health. The contention of the appellant is that the evidence does not show that the injuries received by Andrew J. Buck caused his death. In order to discover a principle which will lead to a just decision of the question here confronting us, it will be necessary to reason from analogous cases, for we have found no case precisely in point, nor have we found in any text writer a rule which governs such a case as this. A long settled rule of the common law adopted and enforced in criminal cases supplies a close analogy. One of the most philosophical of our law writers thus states this ancient rule: "Now these propositions conduct us to the doctrine, that wherever a blow is inflicted under circumstances to render the party inflicting it criminally responsible if death results, he will be deemed guilty of homicide, though the person would have died from other causes or would not have died from this one had not other causes operated with it, provided the blow really contributed either mediately or immediatley to the death sufficiently for the law's notice." 2 Bishop C. L. sec. 637. At another place this author says: "And the wound need not even be the cause concurrent; much less need it be the next proximate one, for, if it is the cause of the cause no more is required." Ibid, sec. 639. The greatest names among the sages of the law are arrayed in support of this doctrine. 1 Hales, P. C. 428. 1 Hauk P. C. 93. It is sustained by the English, American, and Prussian courts. It is the law of the State as declared in at least two cases, one of which was well discussed. Kelley v. The State, 53 Ind. 311: Harvey v. State, 40 Ind. 516. If it is sufficient to show in case where life and liberty are involved that the wrong was the "mediate cause" it should surely be sufficient where nothing more than money is involved. In close agreement with the fundamental principle of which we have just spoken is the doctrine of the court in Jeffersonville Co. v. Riley, 39 Ind. 568, where it was held that the trial court properly refused to instruct the jury, in an action like this, that the injury cannot be regarded as the proximate cause of death, if the deceased had a tendency to insanity and disease, and the injury received by him would not have produced the death of a well person." Straight in line with our own case is that of Drake v. Kiley, 93 Pa. St. 492. In that case a lad was taken against his will on a freight train and carried a distance of five miles. He returned home on foot running most of the way, became ill and the ultimate result was that he became crippled in both legs, and it was held that the defendant was liable for all the injuries received. The court said: "The true rule is that the proximate cause must be determined by the jury upon all the facts in the case." If we were to undertake to declare any other rule than that stated in the case cited we should be involved in inextricable confusion, for it is clear that the passenger who suffers, as the appellee's intestate did, injuries of a serious character, is entitled to some damages and it is impossible for any one to pronounce as matter of law at what the injury flowing from the wrong terminated. The only possible practical rule is that the wrong doer whose act is the mediate cause of the injury shall be held for all the resulting damages, and that the question whether his wrong was the mediate cause is one for the jury. But there are other cases sustaining the doctrine of this court. In Gunner v. Second Avenue R. R. Co., 3 Hun. 494, affirmed on appeal, 67 N. Y. 596, the plaintiff received an injury through the negligence of the railroad company which resulted in a development of a poisonous discharge causing death and the company was held liable. It was there said: "More attentive treatment might have saved the life of the young man, but its necessity was not apparently suspected. He was subjected to that which followed and was designed to be proper by the wrongful act of the defendant. That was the cause which placed his life in jeopardy, because it produced the wound whose poisonous discharge resulted in his death. So it may be justly said of this case, it was the wrongful act of the appellant which placed the intestate's life in jeopardy. He who wrongfully places another's life in jeopardy is responsible for the loss of that life. The appellant did place the intestate's life in jeopardy, and is therefore responsible. The case of Brown v. Milwaukee, etc. Co. 54 Wisc. 342, s. c. 41, Am. Rep. 41, is strongly in point and contains an exhaustive review of the authorities. In that case a pregnant woman was carelessly directed by a brakeman to leave the train at a point three miles short of her destination, and she walked to her destination. This walk brought on a miscarriage and illness, and it was held that for these consequences the carrier was responsible. Many cases are cited in support

of this ruling. A like decision was rendered in Houston, etc. Co. v. Fredericks, by the Supreme Court of Texas, see 41 Am. R. 56 n. In Brown v. Milwaukee etc. Co. *supra*, it was said of the Pullman etc. Co. v. Barker, 4 Col. 344, s. c. 34 Am. Rep. 39, that it is "unsustained by authority." The decision in Santer v. N. Y. etc. Co. 66 N. Y. 50, is that the representatives of one injured through the negligence of a railroad company are entitled to recover damages caused by his death, although the immediate cause of death was the mistake of the surgeon who treated him. In Williams v. Vanderbilt, 28 N. Y. 217, the carrier's negligence caused a passenger to be detained several weeks on the Isthmus of Panama, where he contracted a local fever, which disabled him for a long time after his return to N. Y., and this resulting injury was held a ground of recovery. A man by a wrongful act frightened a woman and caused her to flee from her house; in her flight she fell from a fence, and a miscarriage and illness resulted, and the defendant was held liable for this consequential injury. Barbee v. Reese, 60 Miss. 906. In the same line but not quite so closely analogous, is the case of the Penn. Co. v. Hoagland, 78 Ind. 23; (approved in the Lake Erie etc., Co. v. Fix, 88 Ind. 381, and Louisville, etc. Co. v. Kelly, this term) where it was held that damages were recoverable for illness caused by exposure to cold resulting from carelessness in directing a passenger to alight at the wrong station. It will be found on investigation that the decisions we have referred to are really members of an old and well established class of cases going back as far at least as the case so famous in the books as the "Squib Case." They do no more than apply a well known principle to new and peculiar instances. This general doctrine is well stated in Baltimore etc. Co. v. Reaney, 42 Md. 117, where it was said: "The law is a practical science and courts do not indulge refinements and subtleties, as to causation, that would defeat the claims of natural justice. They rather adopt the practical rule, that the efficient and predominating cause, in producing a given event or effect though there may be subordinate and dependent causes must be looked to in determining the rights and liabilities of the parties concerned." At another place in the same opinion it is said: "To entitle such party to exemption he must not only show that the same loss might have happened but that it must have happened if the act complained of had not been done." Davis v. Garrett, 6 Bing. 716. In a recent work it is said: "Any wrongful act which exposes one to injury from rain, heat, frost, fire, water, disease, the destructive or known vicious disposition or habits of animals, or any other natural cause which rendered it probable that such an injury will occur, is a primary efficient and proximate cause, if the injury ensue. Many such cases have been referred to in the preceding pages." Sutherland on Damages 62. In Byrne v. Wilson, 15 Irish C. L. 332, a stage coach in which the plaintiff was a passenger was thrown into a canal by the negligence of the driver and the lock keeper turned on the water there by causing the death by drowning of the plaintiff, and it was held that the proprietor of the coach was liable under Lord Campbell's act, the court saying: "The precipitation of the omnibus into the lock was certainly one cause (and it may also be said the primary cause) of her death, in as much as she would not have drowned but for such precipitation. It is true that the subsequent leting in of the water was the other and more proximate cause of her death, and that she would not have lost her life but for such subsequent act, which was not the necessary consequence of the previous precipitation by the defendant's servants. But in our opinion the defendant is not relieved from liability for his primary negligence, by showing that but for such subsequent act death would not have ensued. The chief justice in his opinion said: "The law is clear that every party is liable not only for the immediate consequences of his negligence, but also for the resulting consequences of his acts, whether those acts are acts of violence, or negligence in breach of duty which imposed the necessity of care and caution upon him." Proceeding upon the general rule we have stated, the court, in Eaton v. Boston etc. Co., 11 Allen, 500, said: "And it is no answer to an action by a passenger against a carrier that the negligence or trespass of a third party contributed to the injury." A like ruling was made in Spooner v. City of Brooklyn R. Co. 54 N.Y. 230. The case of Hutchell v. Kimbrough, 4 Jones L. (N. C.) 163, supplies an instructive illustration of the rule. There a roof was removed from the house and the eye of the plaintiff was lost in consequence of the exposure resulting and the defendant was held liable. The general rule is recognized and enforced by our own cases. Billman v. Indianapolis etc. Co. 76 Ind. 166 s. c. 40 Am. Rep. 330; City v. Smith, 79 Ind. 311; Burford v. Johnston, 82 Id. 428; s. c. 42 Am. Rep. 42, Dunlap v. Wagoner, 85 Ind. 531; Louisville etc. Co. v. Kunning, 87 Id. 351; Henny v. Davis, (2 Ind. Law Mag. 254). We turn now to the cases cited by the appellee. We have already shown by the quotation made from the able opinion in Brown v. Milwaukee etc. Co., *supra*, that the case of Killman etc. Co. v. Baker, 4 Col. 344, is not sustained by authority, and we now add that it cannot be supported on principle. The case of Krach v. Heilman, 13 Ind. 517 and Collier v. Early, 54 Ind. 539 were shown in Dunlap v. Wagoner, 85 Ind. 531, to be in conflict with the cases of Schlosser v. State 55 Ind. 82; Fountain v. Draper, 49 Ind. 541; Brainaby v. Wood 50 Ind. 405; and English v. Bead, 51 Id. 489, and to be condemned by other courts as well as by text writers. It remains to add that the cases of Ryan v. New York etc. Co., 35 N. Y. 210 and Fairbanks v. Kerr, 70 Pa. St. 86, on which the cases of Krach v. Heilman and Collier v. Early are mainly founded are in direct conflict with the decision in Louisville, etc. Co. v. Kunning,

37 Ind. 351. Not only is this true, but it is also true as shown by Judge Cooley that the cases of Ryan v. New York etc. Co., and Fairbanks v. Kerr are everywhere repudiated. Cooley on Torts 76 n. The courts of New York have not followed Ryan v. New York etc. Co. It very clearly appears from the decisions in Webb v. Rome, etc. R. Co. 49 N. Y. 420; Pollett v. Long, 56 N. Y. 200; Wisner v. Delaware etc. Co., 80 N. Y. 212. We need not stop to enquire whether the case of Shaffer v. Railroad Co., 105 U. S. 249 is sustained by authority or not, for it is readily discriminated from the present case, where the court held that the representative of one who became insane from an injury received in a collision and eight months afterwards, took his own life, would not recover. The court said "the proximate cause of Shaffer's death was his own act of self destruction." * * * * "The argument is not sound which seeks to trace this immediate cause of death through the previous stages of mental aberration, physical suffering and eight month's disease and medical treatment to the original accident on the railroad." There is a plain difference between the case cited and the case at bar. In the former the immediate cause of death was an independent agency, and between the original injury and the death many other causes had intervened and a long time had elapsed, while in this case the death occurred soon after the injury, and the effects of the injury were unbroken and continuous from the time it was received until death ensued. In the case cited the violent act of the man himself produced the death, while in the one in hand a disease superinduced by the injury caused the death, and there was no break in the line of causation. A carrier of passengers is held to the exercise of a very high degree of care, and for a failure to use this care is responsible to a passenger who suffers an injury in a case where no fault of his contributes. It was said by this court in Jeffersonville etc. Co. v. Hendricks, 26 Ind. 228, in speaking of the duty of railroad companies, "But they are required to use the highest degree of care to secure the safety of passengers, and are responsible for the slightest neglect, if any injury is caused thereby." There are many cases in our own reports to the same effect. Cullenwater v. Madison etc. Co. 5 Ind. 339; Thayer v. St. Louis Co. 22 Id. 26; Sherlock v. Arling, 44 Id. 184; Louisville etc. Co v. Kelley, *supra*. The rule is stated in stronger terms by the courts elsewhere as well as by the text writers. Hutchinson on Carriers sec. 500,501 n; Thompson on Carriers, 200, 204. It is the duty of railroad carriers of passengers to stop at the regular stations and at safe places for alighting. Thompson says: "It is the duty of the servants of the railway company to run their trains so that a passenger shall have a reasonably safe place for alighting." This is substantially declared in the Jeffersonville etc. Co. v. Parmalee, 51 Ind. 42; Thompson on Carriers, 228. In the Memphis etc. Co. v. Whitefield, 44 Miss. 466, the court said, in a case very like the present: "Stopping the train at an unusual place rendered the company presumptively in the wrong to that extent, and the onus of explaining this neglect was thrown upon the defendants. Shearman & Redf. Negl. secs. 12-280; Curtis v. R. Co., 18 N. Y. 534; Angell Carriers sec. 369. 2 Redf. R. W. sec. 176." It is said by Hutchinson: "The passenger is entitled not only to be properly carried, but he must be carried to the end of the journey for which he has contracted to be carried, and must be put down at the usual place of stopping." Hutchinson on Carriers, sec. 612. In Prager v. The Bristol, etc. Co. 24 L. T. (N. S.) 105, the train ran by the platform and the passenger was injured in leaving the car. The carrier insisted that there was no evidence of negligence, but Cockburn, C. J., said: "The question is whether there was a want of reasonable care on the part of the defendant and I think there was not only evidence, but abundant evidence of this." The case of Cockle v. South Erie etc. Co., 27 L. T. (N. S.) is very similar to the one just cited and a like ruling was made. In the case last named, it was said: "But it appears to us that the bringing up of a train to a final standstill for the purpose of the passengers alighting, amounts to an invitation to alight at all events after such a time has elapsed that the passenger may reasonably infer that it is intended he should get out if he proposes to alight at the particular station." It is held in the case cited and in many others, that where the stop is made at a dangerous place near the usual station, and about the usual time for stopping, that the carrier should warn the passengers not to leave the train, or should apprize them of the dangerous place. McLean v Burbank, 11 Minn. 270 *vide* op. page 233; Mainy v. Talmage, 2 McLean 164; Lang v. Colder, 8 Pa. St. 483; Stoker v. Salteritall, 13 Peters 192; Montgomery v. Bonny, 51 Ga. 587. The Case of Penn. Co. v. White 88 Pa. 327, is very like the present and the plaintiff was held entitled to recover the court saying "It is the duty of the company to provide for the safe receiving and discharging of passengers. It is bound to exercise the strictest vigilence not only in carrying them to their destination, but also in setting them down safely, if human foresight and care can do so." Railroad Co. v. Aspell, 11 Harris, 147. Applying the law as declared by the authorities cited, and many more might be added, it is clear that there was a breach of duty in running by the station and stopping at a dangerous place. A rule adopted by this court and sanctioned by many authorities of the highest character here requires attention. That rule is thus stated by Judge Redfield. "The fact that injury was suffered by anyone while upon the company's trains as a passenger, is regarded as *prima facie* evidence of their liability." Redfield on Carriers, sec. 341. Professor Greenleafs statement of the rule is substantially the same. Greenleaf on Evidence, sec. 227. Judge Cooley gives the question careful consideration and makes a like statement of the rule. Cooley on Torts, pp. 660, 663. In the early English case of

Christie v. Griggs, 2 Campbell, 79, it was said: "The plaintiff had made a *prima facie* case by proving his going on the coach, the accident and the damage he had suffered." This rule has long been recognized by our cases as the correct one. In speaking of the effect of evidence of the fact that an injury was received by the passenger it was said, in Jeffersonville etc. Co. v. Hendricks, 26 Ind. 223: "Ordinarily the fact should be regarded as *prima facie* evidence of negligence on the part of the company," and this statement of the rule is adopted in the subsequent cases of Sherlock v. Alling, 44 Ind. 184; Pittsburgh etc. Co. v. Williams 74 Ind. 462; Cleveland etc. Co. v. Newell, 75 Ind. 542; Memphis etc. Co. v. McCool, 83 Id. 392; s. c. 43 Am. Rep. 61. In the case last named many authorities are cited to which may be added Railroad Co. v. Walrath, 38 Ohio St. 161; s. c. 43 Am. Rep. 433; Phila. etc. Co. v. Anderson, 94 Pa. St. 351; s. c. 39 Am. Rep. 787; Indianapolis etc. Co. v. Thompson, 93 U. S. 291; Roberts v. Johnson, 58 N. Y. 613; Pittsburgh etc. Co. v. Pillow, 76 Pa. St. 510; s. c. 18 Am. R. 427. The rule is a general one and is stated in general terms, and it is not to be understood that it goes to the extent of supporting a claim to a recovery where the evidence shows there was no negligence on the part of the carrier, or rebuts the presumption of negligence. It must therefore be true in most instances that the negligence or freedom from negligence will appear from the evidence because in proving the occurrence from which the injury resulted, the nature and cause of the accident will necessarily appear. Of course, if the evidence rebuts the presumption of negligence there cannot be said to be a *prima facie* case, although there may be an accident and an injury. In some of the cases a view is taken that if a thing occurs which ought not have occurred had the requisite degree of care been exercised, that then the carrier must show that such care was exercised. In one case it was said: "But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from the want of care." Scott v. London etc. Co., 34 L. J. Exch. 220. Of the case cited a judge, perplexed by the confusion consequent upon departure from the ancient rule, said: "I now gladly turn to one case distinguished from the chaos of authorities depending upon particular facts by an attempt at the application of something like a principle." Flannery v. Wareford, 11 Irish C. L. 30. In the case at bar there was no evidence explaining the failure to stop at the regular station, nor was there any explanation of the failure to give warning, neither was there any explanation of the cause of stopping on the dangerous trestle bridge. We think the evidence fully sustains the finding that there was negligence on the part of the appellant.

The remaining question is whether the intestate was guilty of such contributory negligence as bars a recovery. The question of contributory negligence is generally one for the jury and courts interfere with the verdict only in clear cases. Gaston v. City, 58 Ind. 224; Penn. Co. v. Henril, 70 Id. 569; Louisville etc. Co. v. Richardson, 66 Id. 43; City of Washington v. Small, 86 Ind. 462, see page 469; Penn. Co. v. White, 88 Pa. St. 327; Willard v. Pinard 44 Vt. 34. The court cannot declare as matter of law that a passenger is guilty of contributory negligence who alights from a train, in a dark night, after the customary signal has been given for stopping at his known destination and the train was fully stopped near the usual alighting place and near the time when it was there due. We have already quoted from cases holding that a passenger who alights when a train is brought to a full stop near the usual alighting place is not guilty of contributory negligence in attempting to leave the train, unless it appears that the danger was apparent, and we now direct attention to other cases bearing upon the same subject. In Robson v. The North Eastern R. W. Co., 10 Law R. 271, the train overshot the platform, but the station was not called, and the passenger attempted to alight and was injured. It was held that a nonsuit was improperly directed. It was held, "that there was evidence from which the jury might have properly found that the plaintiff was invited or had reasonable ground for supposing she was invited to alight by the company's servants." The language of the courts in Curtis v. Detroit etc. Co., 27 Wis. 158, clearly states a general principle applicable to this case: "If, under the circumstances of this case, the train in being brought to a stop in such a manner as to induce the belief on the part of the passengers in waiting on the platform that it had stopped for the reception of passengers, and then, when the passengers, acting on this belief, were going aboard, started again without caution or signal, that would constitute negligence on the part of the company, and be so without regard to the question whether the starting was one of necessity or not, or whether the stop was an actual or only an apparent one. It was the duty of the company, if the passengers were not to enter the cars under such circumstances, to have some one there to warn and prevent them." In our own case of Evansville etc. Co. v. Duncan, 28 Ind. 444, a complaint after alleging that the plaintiff took passage for Fort Branch and like matters, stated that by the carelessness of the defendant, the train stopped at the town of Fort Branch, before that part of the train on which the plaintiff was seated had reached the depot, and that by reason thereof the plaintiff was compelled to jump from the car to the ground, and the complaint was held sufficient, the court saying: "As to the second objection, it is sufficient to say that we do not understand from the averments that the rash conduct of the plaintiff produced the injury." In the Columbus etc.

Co. v. Farrell, 31 Ind. 408, the general doctrine we have, is recognized and enforced. In Jeffersonville etc. Co. v. Hendricks, 41 Ind. 48, the court said: "Was not the attempt of the deceased to leave the cars, under the facts stated made under such circumstances that a person of ordinary caution and care would not have apprehended danger therefrom? If it was, then the deceased was without fault or negligence, and in our opinion the decedent was not guilty of negligence in attempting to leave the train under the circumstances." The question stated in the quotation is that which arises in all cases of kindred character, and is one, as a general rule, to be left to the jury. The principle that a man is not guilty of contributory negligence who acts upon a reasonable belief arising from surrounding circumstances is one of wide application, finding perhaps, one of its most striking applications in that class of cases where a passenger leaves a train on order, as he believes, to escape impending danger. Stokes v. Staltenstall, 13 Peters, 181; Twomly v. Central Park etc Co., 69 N. Y. 168; s. c. 25 Am. Rep. 162, n. 164; Wilson v. North Pac. Co., 26 Minn. 278; s. c. 37 Am. Rep. 368; Iron R. Co. v. Morrey, 36 Ohio St. 481, 418; s. c. 38 Am. Rep. 597. In all such cases the passenger is excused even though his belief was an erroneous one, and but for his leaping from the train no injury would have resulted. Without going further into the subject, although many more authorities might be cited, we conclude by a quotation from a recent English author, who, after a thorough review of the adjudged cases says: "But the question of what circumstances amount to an invitation to alight, is clearly one for a jury, and although there seems to have been difficulty felt in times past, by some of our judges, in reference to this point of law, it seems impossible that any further doubt should exist." Browne on Carriers of Passengers, 507. The principles we have stated rule the case and dispose of all the questions presented, whatever form they may assume.

Judgment affirmed.

TAXATION—NATIONAL BANKS—DISCRIMINATION IN FAVOR OF SAVINGS BANKS.

DAVENPORT NATIONAL BANK v. BOARD OF EQUALIZATION.

Supreme Court of Iowa, June, 1884.

1. The fact that a State statute provides that savings banks shall be taxed only upon their paid up capital, while shares of national banks are taxed with reference to their capital including their surplus does not render the latter tax open to the objection that capital invested in national banks is subject to higher taxation than moneyed capital in the hands of individual citizens subject to taxation, both methods being practically the same.

2. A tax upon the capital of a national bank, holding United States bonds deposited to secure its circulation is not a tax upon such bonds.

3. National banks taxed upon their shares cannot complain that savings banks escape taxation upon their capital invested in non-taxable securities, for national banks have the advantage of their bills put in circulation, representing a large part of their capital, and which are not specifically taxed.

This is an appeal from an order of the circuit court affirming certain action of the board of equalization of the city of Davenport township, Scott county. The party herein named as plaintiff, the Davenport National bank applied by petition to the board to cancel an assessment for taxes made upon the shares of stock in the bank. This the board refused to do. An appeal having been taken to the circuit court, and the action of the board having been affirmed, the bank now appeals to this court.

A. J. Hirschl, for appellant; *C. M. Waterman* and *J. C. Bills*, for appellees.

ADAMS, J., delivered the opinion of the court.

The appellant insists that national bank shares are not taxable in Iowa because there is no valid statute in Iowa under which they can be taxed, and can be none while a certain statutory provision is in force in reference to the taxation of saving banks. Its position is that since the enactment of the provision chap. 60, sec. 28, laws of the fifteenth general assembly (McClain's Code, p. 319) the provision in reference to the taxation of national bank shares, code section, 818, has become discriminative against national banks, and is therefore in conflict with sec. 5219 of the revised statutes of the United States. The discrimination is said to consist in the fact that under the statute respecting savings banks, the shares are not taxable, but merely the paid up capital, while under code sec. 818, national bank shares are taxable, and that the burden of taxation cast upon national banks under the statute can never be less than that cast upon savings banks, and may be more and under certain states of facts is more. It contends that the record shows that in the city of Davenport where the appellant is located, there are savings banks which are subject to less taxation than itself is.

The provision of the statute of the United States designed to prevent discrimination, is in these words: "The taxation (of national bank shares) shall not be at a greater rate than is assessed upon moneyed capital in the hands of individual citizens of such States." The appellant contends that savings banks shares are moneyed capital in the hands of individual citizens. The appellees contend that it is not true as appellant claims, that savings bank shares are not taxable, and even if they are not, that there is no discrimination within the purview of the statutes of the United States. The statute in reference to the taxation of savings banks provides that "the paid up capital of all savings banks * * * shall be subject to the same rates of taxation and rules of valuation as other taxable property * * * * which taxes shall be levied on and paid by the banks, and not by the individual stockholders."

If, as the appellees contend, the paid up capital of savings banks is taxable to the banks, and in addition thereto, the shares are taxable to the shareholders, the appellant has certainly no reason to complain. The burden cast upon national banks is far less than that cast upon savings banks. As to whether savings banks shares are taxable, we do not determine. We have reached the conclusion that even if they are not, the taxation of national bank shares is not, within the meaning of the statute, at a greater rate than is assessed upon other moneyed capital. There is no pretense that the taxation is greater than is assessed upon some other moneyed capital, and, in fact, upon moneyed capital generally. The appellant's position is, that if any moneyed capital is favored, national bank capital must be favored to the same extent. But in our opinion each State may as a general proposition provide for the assessment of savings bank capital as well as other property in such mode as it may deem most convenient and effective for the collection of its revenue, and so long as the legislature appears to have been influenced solely by such consideration, any slight advantage accruing as a mere incident to the mode of assessment, should not be deemed a discrimination in rates, of such a character that national banks could properly claim that they should escape taxation or be assessed by some mode different from that provided in the national banking act. If any advantage accrues to saving banks from the mode of assessment which has been provided, it appears to us to be a mere incident of the mode and evincing no desire to favor saving's banks capital. The statute provides for taxing savings banks by assessing the "paid up capital." This in the outset at least should be equivalent to assessing the shares. Later, it might not be strictly so. The shares might come to have some thing of value by reason of good will and accumulated business. But we can not regard that of sufficient importance to justify us in making the ruling which the appellant contends for. Property employed in trade and manufactures by incorporated persons is not taxed with reference to any such consideration. The taxation of shares in incorporated companies which may have something of value by reason of good will, is not, we think, regarded as resulting in inequality of taxation as between shareholders and others owning property similarly employed. Some slight latitude is allowed in modes of assessment, demanded by what are deemed controlling considerations, even though they should not result in absolute equality of taxation. City of Dubuque v. Railroad Co., 47 Iowa 196.

Besides the appellants' shares, as the evidence shows, were assessed solely with reference to its capital, including its surplus. They were not considered worth more than the amount of the appellants' actual assets. The result was precisely the same to the shareholders, that it would have been if the bank capital, including the surplus had been directly taxed instead of the shares, unless in taxing the capital a deduction should have been made by reason of the form which a portion of its capital had taken by investment in non-taxable bonds. Aside from the consideration of such deduction, we think that the taxation to which the appellant was subjected was practically the same as is contemplated for savings banks. This position we understand the appellant to deny. Its shares as we have seen were estimated with reference to its capital including its surplus. The value of national bank shares would always be increased by reason of the surplus, where there is any, and the national banking act contemplates that there shall be a surplus if earned. Now while the net profits of savings banks may all be divided and distributed in the form of dividends, it is competent for a savings bank to reserve all or part, and in some instances, doubtless, this is done. Where done do such accumulated profits escape taxation? We understand that the appellant assumes that they do. But, in our opinion, they do not. We are not inquiring, of course, as to what is actually done in individual cases. That is not material. Our inquiry is as to what the law contemplates. Referring to the statute, in reference to the taxation of savings banks, we have to say that possibly it might be thought that it affords some ground for the appellant's theory. It provides for the taxation of the paid up capital. If we could see any reason for allowing that portion of a savings bank's capital to escape taxation which results from accumulated and reserved earnings, we might think that by paid up capital was meant merely so much of the capital employed as resulted from payments made on subscriptions to stock. But even then we should hardly feel justified in holding the accumulated and reserved earnings exempt. Taxation is the rule and exemption is the exception. Statutes are construed strictly against exemptions. We cannot properly sustain an exemption upon a mere loose and doubtful implication, and that is certainly the most that can be said of the ground of exemption in question. The paid subscriptions to the stock of a savings bank constitute in the outset its working capital. Unpaid subscriptions while regarded to some extent as in the nature of assets should not, of course, be taxed. The words "paid up capital," were probably used in distinction from the broader term capital, which is sometimes understood as including all subscribed capital, though not paid. Taking the provision in its spirit we think that we are justified in regarding it as meaning that there shall be subject to taxation all money and moneyed assets resulting from payments made on subscriptions, and payments made on other obligations where such payments are set apart and reserved as capital, or at least as not exempting any part of such capital. If we are correct in this, savings banks are taxable practically in the same way (aside from one consideration hereafter to be noticed) in which the appellant was taxed, its stocks

having been estimated solely with reference to its paid subscriptions and its surplus.

We come now to the consideration that the taxation of national bank shares is practically a taxation of its capital, including its non-taxable bonds. It is assumed, and perhaps correctly, that savings banks are entitled to a deduction for non-taxable securities held by them as a part of their capital. In respect to this we have to say in the first place that the national banking act contemplates that shares may be taxed, notwithstanding the practical result above mentioned. We are aware that it might be replied to this, so far as savings banks are concerned, that if national banks are taxed, savings bank shares should be also. But this would not obviate the difficulty in question. Individual owners of national bonds cannot be taxed upon them. If it is objectionable to tax shares of national banks while savings banks are taxed merely upon their capital, with non-taxable securities deducted, then national bank shares cannot be properly taxed while individuals hold such securities. If there be any seeming hardship in this it should be remembered that national banks have the advantage of their bills put in circulation, representing a large part of their capital, and which are not specifically taxable.

The claim that national bank shares cannot properly be taxed unless the shares of savings banks holding non-taxable securities are also taxed is substantially disposed of, we think, by People v. Commissioners, 4 Wall, 256.

In our opinion the judgment of the circuit court must be affirmed.

WEEKLY DIGEST OF RECENT CASES.

1. ACTION—CHECKHOLDER CANNOT SUE BANK.
The holder of a check on a bank cannot sue the bank for refusal to pay it on presentation, though the drawer have sufficient on deposit to meet it. *Creveling v. Bloomsbury Nat. Bank.* S. C. N. J. Feb. Term, 1884; 7 N. J. L. J. 200.

2. ACTION—TENANTS IN COMMON—LEASE TO CO-TENANTS.
When several tenants in common unite in renting the property held in common to their co-tenants, they may join in an action to recover the rent due them. *Cahone v. Kinen.* S. C. Ohio, June 17, 1884; 12 Week. L. Bull. Supp. 27.

3. ADMIRALTY—AVERAGE—DECK LOAD.
In a case where a vessel, built with a view of carrying the major part of her cargo on deck, running in a trade where it is customary and necessary to load the major part of the cargo on deck, so trading and so loaded, is compelled by a peril of the sea to jettison part of her deck-load to save the ship and remaining cargo, *held*, the shipper whose goods have been so destroyed for the common safety is entitled to just remuneration. In such a case the whole reason for exempting deck cargo from the benefit of general average fails, and the rule itself ought to fail. *The Hettie Ellis*, U. S. C. C. E. D. La. June 9, 1884, 20 Fed. Rep. 507.

4. AGENCY—DELIVERY OF PROCEEDS OF COLLECTION TO AGENT.
An attorney who receives a promissory note from the agent of the owner for collection, may in good faith deliver the proceeds of the collection to such agent, or pursuant to his direction. *Keys v. Cox*, S. C. Ohio Com. June, 1884.

5. ASSIGNMENT—TRUSTEE—AGENT FOR WHOM.
A trustee, under an assignment for the benefit of creditors, who is authorized to continue the business for their benefit, is not the agent of the creditors, and cannot call upon them for reimbursement for losses, incurred by him although they signed the trust deed. *Chinic v. Garneau.* L. C. H. Ct. Q. B. Div., May 7, 1884, 7 L. N. 210.

6. BANKING—DEPOSIT—DEFENCE TO ACTION.
In an action by defendant in error in the State court, on an assignment of part of the amount standing to the credit of the South Carolina institution, the plaintiff in error set up that the money due said institution had been seized, condemned, and paid over to a United States marshal by virtue of confiscation proceedings. *Held* no defense, and that the assignee's right to recover was unaffected by such proceedings. *Phoenix Bank v. Risley*, U. S. S. C. March 24, 1884; 30 Alb. L. J. 30.

7. BANKRUPTCY—ACTION IN STATE COURT—INJUNCTION.
The bankruptcy court will not restrain by an injunction an action brought in the State court by a creditor seeking to recover his whole debt from a bankrupt who has effected a composition. *In re Negley*, U. S. C. C. W. D. Pa., May 14, 1884, 20 Fed. Rep. 499.

8. BOND—LIABILITY OF SURETIES FOR UNLAWFUL ACTS OF PRINCIPAL.
The sureties upon the bond of a constable are liable for his act in attaching property upon a writ which he had no authority to serve. *Turner v. Sisson*, S. J. C. Mass., Mass. L. Rep. July 10, 1884.

9. CIVIL DAMAGE ACT—LOSS OF SUPPORT—DAMAGE—INJURY TO WIFE FROM OVERWORK.
In an action for loss of means of support, injury to the wife's health caused by overwork is not a proper element of damage. *Elshire v. Schuyler*, S. C. Neb. May 27, 1884, 20 N. W. Rep. 29.

10. CONFISCATION—SEIZURE OF BANK MONEY.
Money in a bank in New York, held to the credit of an institution in South Carolina, is not of such specific quality that it is liable to seizure by a United States marshal in confiscation proceedings. *Phoenix Bank v. Risley*, U. S. S. C., Mar. 24, 1884; 30 Alb. L. J. 30.

11. CORPORATIONS—CAPITAL STOCK—ASSESSMENTS.
Where articles of incorporation fix the amount of the capital stock, the entire amount must be subscribed before a stockholder is liable to assessment for the accomplishment of the main object of the corporation, unless the articles otherwise provide, or there is a waiver of the conditions. *Hale v. Sanborn*, S. C. Neb. May 29, 1884; 20 N. W. Rep. 97.

12. CRIMINAL LAW—REMISSION OF FORFEITED RECOGNIZANCES.
During the term at which a recognizance in a criminal cause is forfeited the court will take off the forfeiture where substantial justice is thereby subserved, although the case may not be strictly within the letter of section 1020 of the Revised Statutes, relating to the remission of forfeited recognizances. *United States v. Barger*, U. S. D. C. W. D. Pa. June 3, 1884, 20 Fed. Rep. 500.

13. EASEMENT—IMPLIED GRANT.
The sale by the owner of two lots overlooking each other of one implies the grant to the vendee of the easement of light which existed at the time for the benefit of his lot. *Sutphen v. Therkelson*, N. J. Ch. Ct. Feb. Term, 1884, 7 N. J. L. J. 214.

14. EVIDENCE—COMPETENCY—SIMILAR CONDITION OF THINGS.
For the purpose of corroborating direct evidence that large ridges of ice were found upon the sidewalk at a particular place and upon a particular day, if that fact was in controversy, other evidence would be admissible to show that the situation of the sidewalk with reference to the adjacent land was such that ice in ridges, from frozen water and melting snow descending upon it, was habitually on the sidewalk at that place. *Berrenburg v. Boston*, S. J. C. Mass. Mass. L. Rep. July 3, 1884.

15. EXECUTORS—EXECUTION OF JOINT POWER—EFFECT OF RENUNCIATION—OF EXECUTOR—CONTRACT TO SELL LAND.
Where two persons are named in a will as executors, "with full power and authority to sell and convey real estate," and one of such persons renounces the trust, the other may, under the provisions of section 5844 of Howell's Statutes, execute the power, and a contract executed by him alone to sell and convey such real estate is valid. *Vernor v. Coville*, S. C. Mich. June 25, 1884, 20 N. W. Rep. 75.

16. FALSE IMPRISONMENT—ARREST BY PRIVATE CITIZEN—PRESENT FELONY.
A private citizen may arrest where a felony is committed in his presence and he acts upon reasonable grounds for his belief that the arrested party is guilty. *Neal v. Jones*, S. C. N. C. 18 Rep. 56.

17. FRAUD ON CREDITORS—TRANSFER OF PROPERTY TO PARTNER.
Where the property of a partnership is transferred to one of the partners for his benefit for a valuable consideration, he may hold it free from partnership debts. *George v. Wamsley*, S. C. Iowa, June 12, 1884; 20 N. W. Rep. 1.

18. INSURANCE — FIRE — FORFEITURE — STOVE — NAPHTHA GAS.
Placing a stove (without knowledge or consent of the company) in a room in which is used a large quantity of inflammable naphtha gas is an increase of risk which will avoid a policy. *Daniels v. Equitable F. Ins. Co.*, S. C. Conn. 18 Rep. 43.

19. INSURANCE— LIFE — INTEMPERANCE — IMPAIRMENT OF HEALTH.
A condition in a life policy that it should be void if by intemperate habits, the health of the insured should be impaired does not contemplate a permanent impairment; temporary impairment is sufficient. *Davey v. Ætna Life Ins. Co.*, U. S. C. C. D. N. J.; 20 Fed. Rep. 483.

20. JOINT COVENANT—BREACH BY ONE COVENANTOR—LIABILITY.
A joint covenant not to engage in a like occupation for a certain time in a neighborhood is violated by the engagement in a like business by one of the covenantors. *Elliot v. Stanley*, U. C. H. Ct. Ch. Div.; June 19, 1884.

21. JURISDICTION OF UNITED STATES COURT—PARTY ESTOPPED FROM DENYING JURISDICTION OF COURT AFTER HAVING HIMSELF REMOVED THE CASE THITHER.
A case having been removed, on motion of defendant, from a State to a Federal court, he can not move its dismissal on the ground that it was improperly brought in the original court, such an objection being now immaterial; neither can he attack the jurisdiction of the court to which it it has been removed upon his motion. *Edwards v. Conn. Mut. L. Ins. Co.*, U. S. C. C. N. D. N. Y. June 6, 1884; 20 Fed. Rep. 452.

22. LIBEL—WORDS ACTIONABLE PER SE—INJURY TO PROFESSIONAL STANDING—MALICE.
Defamatory words, falsely spoken or written of one in his profession, are actionable *per se*; and prejudice to the person defamed thereby, and malice on the part of the defamer, are implied in law. *Pratt v. Pioneer Press Co.*, S. C. Minn. June 12, 1884; 20 N. W. Rep. 87.

23. WILL—CONSTRUCTION—DEVISE OF ESTATE—SUBJECT TO BE DIVESTED.
A devise to the testator's children provided that if any should die without issue, their share should go to the survivors, and, if with issue, to them, contemplated their deaths in his lifetime only, and not where they all survived him. *Barrell v. Barrell*, N. J. Ch. Ct., 11 Stew. 60.

24. WILL—CONSTRUCTION—DEVISE OF INCOME.
A devise to A and B of the income of estate for their lives in certain proportions, and the estate at their deaths to the children of both, (the grand-children of the testator), at the death of A his children are entitled to his share of the income until B's death, upon which the estate is to be divided *per capita*. *Benedict v. Ball*, N. J. Ch. Ct. 11 Stew. 48.

25. WILL—CONSTRUCTION—ESTATE DEVISED.
A devise, made in 1844, to A and B "and their heirs, as tenants in common, and not as joint tenants; but if the said A should die without leaving lawful issue, then, and in that case," his moiety to go "to B his heirs and assigns forever," passes to A a fee tail which may be barred by a deed executed and acknowledged for that purpose. *Lawrence v. Lawrence*, S. C. Pa., March 3, 1884; 14 W. N. C. 460.

26. WILL—REVIVAL OF WILL—REVOCATION OF SECOND WILL.
The revocation of a second will does not revive the former one. *Peck's Appeal*, S. C. Conn. 17 Rep. 782.

QUERIES AND ANSWERS.

[*** *The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*

QUERIES.

9. A is an elemosynary corporation of which B is the acting or managing agent, invested by A with plenary powers for the government of the pupils who may attend the school. C is a student of the school in good standing, and is arbitrarily expelled by B. What recourse has C against the corporation A for the unjust deprivation of his scholarship? What is the measure of damages? Please cite authorities.

ARKANSAS.

QUERIES ANSWERED.

Query 57. [18 Cent. L. J. 499.] Where a corporation is plaintiff in a civil suit, should the justice grant a change of venue, where the affidavit is regular, but made by plaintiff's attorney, or must an affidavit for change of venue be made, by some officer of the corporation? E.

Atlanta, Ga.

Answer. In suits between persons, other than corporations, the party applying for a change of venue must support his petition with his own affidavit, or the change will be refused. McCausley v. People, 88 Ill. 578. Norvell v. Porter, 62 Mo. 310. The affidavit of an agent will not do. Huthsing v. Mans, 36 Mo. 101. Nor is the affidavit of an attorney sufficient. Levin v. Dille, 17 Mo. 64; Stevens v. Burr, 61 Ind. 464; *Contra*, Ellsworth v. Henshall, 4 Greene (Iowa) 417; Scott v. Gibbs, 2 Johns. Cas. 116. If there be several defendants they must all join in the application. Sailly v. Hutton, 6 Wend. 508; Whittaker v. Reynolds, 14 Bush, 615. But the application need not be supported by the affidavits of all. If verified by one it is sufficient. Walcott v. Walcott, 32 Wis. 63. As a corporation can only act through agents, it would be deprived of the right of change unless it could support the application by the affidavit of an office or agent. Any recognized officer of the corporation may make the affidavit. Com. Ins. Co. v. Mahlman, 48 Ill. 313; Western Bank v. Tallman, 15 Wis. 92; State v. Milwaukee etc., 47 Wis. 670. It is sufficient if the affidavit is made by that agent whose duty it is to look after claims of the character in suit, and who is conversant with the facts on which the application is based. Jones v. C. R. I. & P. R. Co., 36 Iowa, 68. The sensible view would be, in all civil cases, to allow the affidavit to be made by an agent or attorney who has knowledge of the facts, unless it appears that the party or some other agent is possessed of more complete and certain in respect to such facts. See Dean v. White, 5 Iowa, 266; Brady v. Otis, 40 Iowa, 97.

Hamilton, Mo. CROSBY JOHNSON.

RECENT LEGAL LITERATURE.

LEGAL ETHICS. An essay on Professional Ethics, by Hon. George Sharswood, L.L.D. Fifth edition. Philadelphia. T. & J. W. Johnson & Co., 1884.

This has been one of the most popular books ever published, having reached its fifth edition, the first having been published in 1854, thirty years ago. It is an excellent thing for the perusal of young men, and will deserve the same by older men. The learned Chief Justice was a man of such sound sense that his words may well be learned. His ideas upon the duties of the bench and bar are worthy of the deepest consideration. No matter what may be said, the influence of the class of men who surround the lawyers, and the character of the business intrusted to them are demoralizing, and it is well for them to have something constantly reminding them of their duties. His comments upon fidelity to clients, the propriety of taking contingent fees, compensation, study, manners, judicial legislation, legislation, *stare decisis* and his eulogy of Chief Justice Marshall will alone keep George Sharswood fresh in the memories of lawyers, when the graves of other men supposed to be equally great are no longer kept green. If we had many more men whose shining example was equal to that of him whose name the book before us bears, there could be less dishonesty in the profession, and therefore less public odium.

LEGAL MISCELLANY.

ORIGIN OF TRIAL BY JURY.

J. M. Kerr, in *The Current* (Chicago), for May 3, in an article on "The Great Modern Farce," gives the various theories respecting the origin of trial by jury as follows:

1. Phillips and Probst maintain that it originated among the Welsh, from whom it was borrowed by the Anglo-Saxons.

2. Coke, Van Maurer, Phillips, Selden, Spelman and Turner regard it as having been original with the Anglo-Saxons.

3. Bacon, Blackstone, Montesquieu, Nicholson and Savigny hold that it was imported from primitive Germany.

4. Konrad Maurer thinks it is of North German origin.

5. Warmius and Warsaae agree that it was derived from the Norsemen, through the Danes.

6. Hicks and Rees thinks it came from the Norsemen, through the Norman Conquest.

7. Daniels says the Normans found it existing in France, and adopted it.

8. Mohl thinks it derived from the usages of the Canon law.

9. Meyer thinks it came from Asia by way of the Crusades.

10. Maciejowski says that it was derived from the Slavonic neighbors of the Angles and Saxons.

11. Brunner, Palgrave, and Stubbs derive it from the Theodosian Code, through the Frank Capitularies.

12. Hume says that it is derived from the decennary judiciary, and is "an institution admirable in itself, and the best calculated for the preservation of liberty and the administration of justice that was ever devised by the wit of man."

MISSOURI BAR ASSOCIATION.

The meeting of the Missouri Bar Association was a very successful affair, a large number of the promi-

nent lawyers of Missouri being present. One of the prominent features of the meeting was the reading of papers upon legal subjects. D. C. Allen of Liberty read an article upon "The Theory of Code Pleading," while the other papers read were as follows: D. A. DeArmond of Rich Hill, "The Law's Delay;" James Ellison of Kirksville, "The Jury System:" B. R. Vineyard of St. Joseph, "Inter-State Law;" Judge T. A. Gill of Kansas City, "Sovereign Preeminence and Individual Rights." Judge Bakewell discoursed on the jury system. The banquet followed. To the toast "The Supreme Court of Missouri," Judge Henry of Jefferson City, responded, and Judge Lewis of the St. Louis Court of Appeals, answered the toast to that court. Commissioner Phillips responded to the toast, "The Supreme Court Commission." The *nisi prius* courts of Missouri," was the toast responded to by Judge C. G. Burton. In the absence of William Warner, J. W. Dunlap answered to the toast, "The Lawyer; his Influence in Society," while ex-Governor Reynolds was substituted for J. F. Williams and responded to the toast, "The Integrity of the Bar." The concluding toast was, "The Bachelors of the Bar," which was responded to by Edwin Silva. The meeting adjourned until the summer of 1885.

LEGISLATIVE OVERSIGHTS.

The majesty of the law is a great and awful thing, but it is sometimes maintained at the expense of perplexing, illogical methods. A case in point is afforded by the application of the extraordinary law to be found in the public statutes of Massachusetts, chapter 20, section 18, which reads as follows: "If a jailor or other officer voluntarily suffers a prisoner in his custody upon conviction or upon a criminal charge to escape, he shall suffer the like punishment and penalties as the prisoner suffered to escape was sentenced to or would be liable to suffer upon conviction of the crime wherewith he stood charged." Under this statute is called the case of the government against John Smith. Government states that officer John Smith, voluntarily suffered William Jones, a prisoner in his custody upon the charge of murder in the first degree, to escape, and moves that sentence of death be passed upon John Smith. Smith admits voluntarily suffering Jones to escape, but says that Jones has been recaptured and may be innocent, and that it is not fair to hang him first and try him afterward; but the court says that nevertheless that was doubtless the intent of the law, and sentences John Smith to be hanged by the neck till he is dead, and then tries William Jones, and the jury acquits him. It is true that the prisoner should be punished in a suitable manner, but it seems an absurd relic of barbarism to leave the law as it stands.—*Ex.*

OUR COMMON LAW.

In a very excellent after-dinner speech in Arkansas recently, Judge Caldwell, of the United States court, thus spoke of the common law: "For a thousand years judges have been talking about the common law and affecting to decide cases according to that law. What the common law is, who made it, and where it is to be found, not one of them can tell you. They tell you the United States has no common law of its own, and that the States have none, but that the English common law is our inheritance. I am sorry we fall heir to any such myth. You all recollect Mrs. Gamp, Sarah Gamp, Dickens' celebrated professional nurse. During a long life she was constantly quoting the opinions of Mrs. Harris, a purely imaginary person, in order to give more weight to her own. When we come to the common law the judges are all Sarah Gamps and the common law is Mrs. Harris. Nothwithstanding that the common law is the invisible and intangible thing I have described, it is the most difficult law to get rid of in the world. You can repeal one statute by another, but it takes three statutes to repeal a rule of the common law. This results from the maxim that a statute contrary to the common law shall be strictly construed, which is interpreted by the judges to mean, shall be construed to have no effect. This maxim is applied by the judges until the legislature has re-enacted the statute in different forms about three times. * * * * Law like everything else is amenable to the law of evolution. It must grow, expand and develop to meet the altered conditions of society. Judges and lawyers, as a class, are extremely conservative. They are slow to adopt new methods of procedure, or change rules of decision, although it may be obvious that justice would thereby be promoted. It is probably well that this is so. In a country where changes of opinion and policies are so frequent it is well to have one conservative department. For much of the uncertainty of the law judges are not justly censurable. The law is not an exact science, and neither legislation nor judges can make it so. Science is truth ascertained —in law you can never feel certain you have reached that point."

NOTES.

——A lawyer's frank statement: "I hire an office; I hang out my gilded sign; I prepare my web; I invite the flies to come in—and they do come in."—*Ex.*

——Connecticut lawyers are now obliged to stand while examining witnesses. This is an artifice to keep the side-judges from going to sleep.

——"I admit," the young lawyer, "that I am not a very good man, but then how could you expect it of me. It's practice that makes perfect, you know, and that I haven't got.

——"Will you cross-examine the witness?" asked the Judge of a Vermont lawyer, as a lady was about to leave the stand. "No, your Honor," was the reply; "I have been married ten years and know better."

——An unusual case has just been decided by the Supreme Court of Connecticut. In 1878 the Mystic Island Home on Mystic Island was sold to E. Jardine and wife by Wm. Brewer, who took a mortgage on the place for $8500. In March, 1881, Brewer assigned the property to Edward Chappell of Norwich, who brought a petition for foreclosure. When sold the property was in New York, but the inter-State commission on boundary, between sale and petition for foreclosure, changed the New York boundary, carrying it south of Mystic Island and leaving the island in the town of Stonington, Conn. The counsel for Jardine demurred to the petition for foreclosure on the ground that the rights of the parties to contract made in New York could not be abrogated under the laws of Connecticut, and claiming that plaintiff must find relief in some other way than through the petition for foreclosure under the laws of Connecticut. The Superior Court at the trial overruled the demurrer and decreed foreclosure The case was appealed to the Supreme Court, which finds the action of the lower court in error, and orders the judgment reversed. The counsel for plaintiff is puzzled to find the best way to secure his rights.—*Ex.*